IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 27.09.2006

Coram

The Honourable Mr. Justice K. RAVIRAJA PANDIAN

and

The Honourable Mr. Justice M. CHOCKALINGAM

Crl. A. Nos.24 and 45 of 2003

Senthilkumar ... Appellant in Crl.A. No.
24 of 2003

1. Velmurugan
2. Raja @ Nagaraj
3. Anbu @ Suresh Babu ... Appellants in Crl.A. No.
45 of 2003

..Vs..

The State of Tamil Nadu,
rep. by its Inspector of Police,
Erode North Police Station,
Erode District. ... Respondent in both appeals

Appeals filed under section 378 Cr.P.C. praying for the relief as stated below.

For Appellants : Mr. R. Sankarasubbu
assisted by Mr. Doraiswamy
for Mr. Shivapandi

For Respondent : Mr. P. Kumaresan,
Addl. Public Prosecutor

JUDGMENT

(Judgment was delivered by M. CHOCKALINGAM, J.)

This judgment shall govern two appeals viz. Crl.A. Nos.24 and 45 of 2003. Crl. A. No.24 of 2003 is preferred by third accused, while Crl.A. No.45 of 2003 is preferred by accused 1, 2 and 4 against the judgment dated 30.4.2002 passed in S.C. No.16 of 2002 on the file of the Additional Sessions Judge-cum-Fast Track Court No.I, Erode.

2. These appellants, ranked as accused 1 to 4, stood charged, tried and found guilty under Sections

120(B), 302 and 380 of the Indian Penal Code and awarded life imprisonment for the offences punishable under Sections 120(B) and 302 of the Indian Penal Code and three years Rigorous Imprisonment for an offence under Section 380 of the Indian Penal Code and they should undergo the imprisonment concurrently, while the fifth accused was acquitted of the charges levelled against him.

3. The short facts necessary for the disposal of these appeals can be stated thus: P.W.1 was running an oil shop in the name of Annapoorna Agency at No.92, Thiru.vi.ka Street, Erode Municipal Colony. The deceased Chandrasekar, who is the cousin brother of P.W.1, and the first accused were employed there. When the first accused was under employment, he committed theft of oil and sell them. The same was noticed and complained by the deceased to P.W.1. On enquiry, P.W.1 terminated the services of the first accused and thereafter, the deceased Chandrasekar also left the service, stating that he wanted to commence his own business and some times later, he came back and joined service. The first accused, whose service was terminated, though employed in different places, came back and on his request, he was again put in service by P.W.1. Thus, during the relevant period, both the deceased and the first accused were actually employed in the shop of P.W.1.

4. On the night of 7.6.2001, there was a demand for oil by a customer, but the oil was not available and hence P.W.1 informed him that he could come and collect the oil, the next day morning. On the instructions of P.W.1, the deceased stayed over in the shop for the purpose of loading the oil, which was expected to come that night. P.W.2 is the neighbor, residing in the adjacent house. On coming to know about the night work, the deceased informed P.W.2 to come for work that night. Accordingly, P.W.2 left his house, went to the night show and proceeded towards the shop in question.

5. At about 1.30 p.m., when he was nearing the shop, he found the third accused just proceeding towards the shop and raising the shutter, following which, accused 2 to 4 also entered the shop. They immediately pulled down the shutter. On seeing this, P.W.2 went aside and witnessed the occurrence, which took place inside the shop, through a window. At that time, he saw the first accused attacked the deceased with aruval on the right neck of the deceased; the second accused stabbed him on the stomach and on the right side of the chest, the third accused caused injury with knife on the lower face and neck and the fourth accused caused injury with scissile on the right side of the neck.

6. Immediately after attacking the deceased Chandrasekar, they took the cash of Rs.82,620/-, which was kept in the drawer of P.W.1 and came out, closed the shutter and ran away from the scene of occurrence. P.W.2, after witnessing the entire incident, in the grip of fear and terror, went to home and kept quite. All these four persons left the place in one TVS 50 and one TVS Scooty. P.W.3, a Ward Councilor, a Contractor in profession, after returning from village asking for workers, found the accused vehicles hit against his vehicle. When he stopped his vehicle, he found the accused, who are sitting in TVS Scooty, were having blood stained knife and immediately he entered into suspicion and followed them and noted down the numbers of the vehicles.

7. The next day morning, P.W.4, who came to the shop for collecting the oil, found that blood is coming out of the shutter. He immediately rushed to P.W.1 and informed him and P.W.1 had rushed to the shop, opened the shutter and found the deceased Chandrasekar in a pool of blood. He found the cash was missing from his drawer. He proceeded to the respondent-police and gave a complaint to P.W.18, the Sub Inspector of Police.

8. On the strength of the same, a case came to be registered on 8.6.2001 at about 10.00 a.m. in

Crime No.314 of 2001 for the offences under Sections 302 and 380 of the Indian Penal Code. Express First Information Report Ex.P35 was despatched to the concerned Court.

9. P.W.18 the Inspector of Police, who took up investigation, proceeded to the spot and made inspection and prepared Observation Mahazar Ex.P9 and rough sketch Ex.P36 in the presence of P.W.10 and other witnesses.. He recovered M.O.1 knife and other material objects available in the place of occurrence. Photos were taken through P.W.8 Photographer. Photos were marked as M.O.7 series and negatives were marked as M.O.8 series. He conducted inquest on the dead body and the inquest report is marked as Ex.P37.

10. Pursuant to the same, the dead body was sent to the Doctor P.W.9 for autopsy. P.W.9 Doctor, attached to the Government Hospital, conducted autopsy on the dead body and has given his opinion that the deceased appears to have died, due to shock and hemorrhage, due to injuries sustained by him.

11. Pending investigation, P.W.17 arrested accused 1 and 4 on 17.6.2001 and both of them gave a confession statement voluntarily. The admissible portion of the confession statements were marked as Exs.P12 and 15 respectively. The first accused produced M.O.11 Moped, a cash of Rs.12,210/- M.O.12, Rexin bag M.O.2 and Cheque book M.O.3 and the same were recovered under Mahazar Ex.P11. Apart from this, the first accused also produced M.O.4 aruval, M.O.13 Shirt, M.O.14 gunny bag and the same were recovered under Mahazar Ex.P13. The fourth accused produced M.O.15 Scooty and a cash of Rs.12,150/- and the same were recovered under Mahazar Ex.P14. The fourth accused also produced M.O.6 Scissile, M.O.17 Shirt, M.O.18 gunny bag and the same were recovered under Mahazar Ex.P16.

12. P.W.17 also arrested accused 2 and 3 on 18.6.2001. The second accused voluntarily gave confession statement and the admissible portion of the same is marked as Ex.P19. The second accused, pursuant to the confession statement, produced cash of Rs.13,300/- M.O.20, Camera M.O.21, Album M.O.22, Plastic bag M.O.23, Konica cover M.O.24, Negatives M.O.25, Camera cover M.O.26 and the same were recovered under Mahazar Ex.P18. The second accused also produced M.O.5 knife, M.O.27 shirt, M.O.28 Pant and the same were recovered under Mahazar Ex.P20. The third accused, on arrest, gave a confession statement and the admissible portion of the same is marked as Ex.P22. The third accused also produced a cash of Rs.9,250/- M.O.29 and the same was recovered under Mahazar Ex.P21. M.O.30 shirt and M.O.31 gunny bag produced by the third accused were recovered under Mahazar Ex.P23. All the accused were sent for judicial remand.

13. Pursuant to the confession statements given by the accused 1 to 4, P.W.18, the Inspector of Police arrested the fifth accused, who gave confession statement voluntarily and the admissible portion of the same is marked as Ex.P26 and from whom P.W.18 recovered a sum of Rs.2,670/- M.O.32 under Mahazar Ex.P27. Following the requisition Ex.P2, the statement under Section 164 of the Criminal Procedure Code was recorded from P.W.2 by P.W.12, the learned Judicial Magistrate No.2, Erode. The statement recorded by P.W.12 was marked as Ex.P24.

14. Following the requisition made by P.W.18, an identification parade was conducted by P.W.12, the learned Judicial Magistrate No.2, Erode, after following the procedural formalities. P.Ws.3 and 6 identified the accused 1 to 4 and identification proceedings were marked as Ex.P25. All the material objects were subjected to chemical analysis and Ex.P30 Chemical analysis report and Ex.P31 Serological report were received. On completion of investigation, P.W.18 filed a final report and the case was committed to the Court of Sessions. Necessary charges were framed against the accused.

15. In order to substantiate the case, the prosecution examined 18 witnesses as P.Ws.1 to 18 and

relied on Exs.P1 to P37 and also relied on M.O.s.1 to 37. On completion of evidence on the side of the prosecution, when the accused were questioned under Section 313 of the Criminal Procedure Code, they denied them as false. No defence witness was examined.

16. The Trial Court, after hearing the arguments advanced by either side and after scrutinizing the materials available on record, convicted the accused 1 to 4 under Sections 120B, 302 and 380 of the Indian Penal Code and awarded punishment referred to above and acquitted the fifth accused. Hence this appeal at the instance of the appellants.

17. Advancing arguments on behalf of the appellants, learned counsel would submit that in the instant case, the prosecution has miserably failed to prove its case. According to the learned counsel, the prosecution relied on the evidence of P.Ws.2 and 3. P.W.2 was a person, who witnessed the occurrence through a window. P.W.3 was the witness, who saw the accused nearby the place, after the occurrence. The evidence of P.Ws.2 and 3 have to be rejected by the Trial Court outright.

18. Learned counsel added further that insofar as the evidence of P.W.2 is concerned, according to him, he saw the occurrence through a window. The window is actually situated on the northern side of the place of occurrence, but, according to P.W.2, the window is situated on the eastern side. Apart from this, P.W.2 is the close friend and neighbour of the deceased Chandrasekar. If it is so, his natural conduct should have been to inform the same to anyone of the family members of the deceased immediately or to P.W.1, owner of the shop or to the police, but he has not done in any way and kept quite, till he was examined by the police. Thus, it would go to show that the conduct of P.W.2 is thoroughly unnatural. On this ground, his evidence should have been rejected.

19. Learned counsel further added that P.W.3 has not given evidence to the effect that he has identified the assailants in the identification parade. In the instant case, according to Observation Mahazar, there was a knife placed nearby the deceased, but, according to P.W.3, he saw the knife in the hands of the third accused, who was sitting in the pillion of Moped. Hence P.W.3 could not have seen the assailants at all. According to him, he went to nearby village to get the workers and when he was returning in that night, he stopped his vehicle and found that all these accused came in two wheelers and one of the accused was having blood stained knife. Had it been true, no one would carry the knife in such a way to witness by others. Equally P.W.2, P.W.3, though claimed to be the Ward Councilor, did not at all inform the same to anybody till he was investigated by the police. Since he did not speak about the fact for few days, the same is unreliable. Hence his evidence has got to be rejected.

20. Learned counsel further added that the strong circumstance, according to the prosecution, is the evidence of P.Ws.6 and 7. According to P.W.6, he has seen all these persons and according to P.W.7, who was a taxi driver, identified the fourth accused. At this juncture, learned counsel pointed out that these two witnesses were introduced in order to suit the prosecution case. It was a subsequent thought. Had it been true, anyone witnessed the assailants in the place or nearby the place of occurrence, their natural conduct is to inform the police.

21. Learned counsel added further that the identification parade was not procedurally done. In the identification parade, all these four accused even admitted by the investigators, have completely shaven their heads. If it is so, in the identification parade, which was conducted by the learned Judicial Magistrate, the number of persons as that of the accused should have marched along with the accused, but that not done so. In view of the ruling of the Apex Court, once identification parade of certain accused and the persons having the similar features of the accused were not placed along with them, such identification parade should not be given any legal effect. Learned counsel added further that the photographs of all the assailants were flashed in the Newspaper. After seeing the

Newspaper, P.W.2 could have easily identified the accused. Under such circumstances, the identification parade, though conducted within a reasonable time, cannot be given any legal effect.

22. Learned counsel added further that much weightage has been given by the Trial Court with regard to the recovery part. Insofar as recoveries are concerned, only one witness has been examined as P,.W.11, who is the Village Administrative Officer, for the entire recovery. Even according to P.W.11, he has admitted that he has given evidence in 100 cases. Hence he is the stock witness for the purpose of giving evidence for all the recoveries, which would go to show that it was a planted evidence. Under such circumstances, the recovery part should not be given any weightage and thus in the instant case, the evidence put forth by the prosecution was thoroughly unreliable. The Trial Court accepted the evidence of the prosecution and found the accused guilty, but they are entitled for acquittal in the hands of the Court.

23. This Court heard the learned Additional Public Prosecutor on the above contentions. The Court paid its anxious considerations on the submissions made by either side.

24. It is not a fact in controversy that one Chandrasekar,, who was employed under P.W.1, was done to death in the occurrence took place on 8.6.2001 at about 1.30 p.m. and following the inquest made by P.W.18 Inspector of Police, P.W.9 Doctor conducted post-mortem on the dead body and has given opinion that the deceased died, due to shock and hemorrhage, due to the injuries on the vital parts of the body. At no point of time, the accused appears to have questioned the said fact. Hence the deceased Chandrasekar died due to homicidal violence and the same has to be recorded.

25. In order to substantiate, the case of the prosecution is that pursuant to the conspiracy hatched by the accused, they went to the shop of P.W.1 and attacked the said Chandrasekar on 8.6.2001 at about 1.30 p.m. and caused his death instantaneously and also took away the cash of Rs.82,620/-, which was kept in the drawer of P.W.1. The prosecution examined P.Ws.2, 3, 6 and 7 to prove its case.

26. Insofar as the evidence of P.W.2 is concerned, according to him, he was the neighbour of the deceased Chandrasekar. On that day evening, he informed Chandrasekar to come for loading oil. He went to night show and when he was nearing the shop at about 1.30 p.m., he saw the third accused running towards the shop. Due to anxiety, P.W.2 went near the shop and found that accused 2 to 4, before getting inside the shop, closed the shutter and all the accused started attacking the deceased. The first accused attacked the deceased with aruval on the right neck of the deceased; the second accused stabbed him on the stomach and on the right side of the chest, the third accused caused injury with knife on the lower face and neck and the fourth accused caused injury with scissile on the right side of the neck. Thus, he gave the narration of the entire incident. Apart from that, he witnessed the occurrence through a window. After doing so, the accused took the cash of Rs.82,620/-
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27. Insofar as the evidence of P.W.2 is concerned, it has to be looked into with careful scrutiny. The Court is satisfied that he inspires the confidence of the Court. Some criticisms are levelled against the evidence of P.W.2. The first criticism which was levelled against him was that had it been true that he witnessed the said occurrence, since the deceased was his friend, his natural conduct should have been to inform the same to the family members of Chandrasekar or P.W.1 or to the police.

28. Now at this juncture, the explanation tendered by P.W.2 is worth mentioning. According to P.W.2, after witnessing the occurrence, he went to his house and he did not speak about the same to anybody, as he was frightened by the incident. Only on the next day evening, he went to the tea shop and on reading the newspaper report about the incident, his conscience pricked him to inform the

police about the occurrence and hence he went to the police station and enquired, whether the Inspector was available. Since the Inspector was not available, the next day morning, he went to the police station again and narrated the entire occurrence. It is pertinent to point out that P.W.2 had the explanation to offer. This is not the case where P.W.2 came out of the house at night hours only to witness the occurrence. When one is attacked by four persons, naturally he would not reveal the same immediately to anybody. In the instant case, after seeing the Newspaper report, since he has conscience, he reported the same to the police on the next day morning. Insofar as the evidence of P.W.2 is concerned, nothing can be attributed, whether he is in inimical terms with the accused or in any way connected with P.W.1. As could be seen from the evidence of P.W.2, the way in which he has given evidence is cogent, convincing and rightly accepted by the Lower Court.

29. The second criticism levelled against the evidence of P.W.2 is that he looked the occurrence through the window situated on the eastern side but the window is actually situated on the northern side. As could be seen from the sketch and also from the evidence of P.W.2, this Court is of the considered opinion that much weightage should not be given to the discrepancy, in view of the fact that when P.W.2 witnessed the occurrence, out of anxiety, naturally, he should have forgotten through which window he witnessed the occurrence. Hence, in the opinion of the Court, this discrepancy is minor, which need not be given any importance.

30. Insofar as the evidence of P.W.3 was concerned, he was the Ward Councilor. According to him, he informed the workers for contract nearby village and when he was returning in his two wheeler, suddenly his vehicle was hit by the accused in the main road. Then, he noticed all these four accused were coming in two wheelers, while some of them are having blood stained knife. He entertained suspicion and he also talked to them. He also noted down the numbers of all these two wheelers. Now the contention put forth by the learned counsel for the appellants is that once he claimed to be the Ward Councilor, his duty is to immediately bring to the notice of the police. It is to be pointed out that he could have informed the police, if really he knew about the occurrence. He only saw the accused moving away from the place of occurrence. Once he came to know about the fact from the Newspaper, he gave statement to the police.

31. All these accused were arrested on 17.6.2001 and 18.6.2001 respectively. The occurrence had taken place on 8.6.2001. If it is so, within a short interval, the accused were arrested. Thus the identification parade was conducted within a short span of time i.e. on 28.6.2001 and P.W.3 was able to identify all the four accused, as he had everything in his fresh memory.

32. Regarding identification parade, learned counsel relied on the judgment rendered in BALAK RAM v. STATE OF U.P. (1974 S.C.C. (Cri.) 837). On a perusal of this judgment, the Court is of the considered opinion that the judgment cannot be applied to the present facts of the case. Their Lordships took this as one among the points for considering the case for acquittal. This was not the sole point in this case. Hence the findings are not applicable to the present case on hand.

33. The contention put forth by the learned counsel for the appellants is that as per the admission of the Investigators, all the accused were found in shaven head and the presence of same identity persons should have also been marched in the identification parade along with assailants. Ordinarily, this contention should be accepted. But, in the instant case, P.W.3 has not only identified the accused, but also within a short span of time. There are other materials to accept his evidence.

34. The test what could be applied in this case to accept the evidence of P.Ws.2 and 3 is whether the statements of these witnesses under Section 161 of the Criminal Procedure Code were recorded before the arrest of the accused or after the arrest of the accused. In the instant case, the perusal of the case papers clearly indicate that the evidence of witnesses 2 and 3 were recorded on 10.6.2001

and reached the Court on 11.6.2001, but the arrest of the accused 1 to 4 had taken place only on 17.6.2001 and 18.6.2001 respectively. Hence it would be clear that the statements recorded from these two witnesses are nothing but expression of truth, since statements under Section 161 of the Criminal Procedure Code were recorded on 10.6.2001 and the same were reached the Court on 11.6.2001 itself. Thus, the evidence of these two witnesses has rightly been accepted by the Trial Court. The added circumstance is the evidence of P.W.6, who saw accused 1 to 4 and also the evidence of P.W.7, who identified the fourth accused.

35. Yet another circumstance in this case is the recovery of M.Os.. Accused 1 and 4 were arrested on 17.6.2001 and Accused 2 and 3 were arrested on 18.6.2001. On their arrest, they voluntarily gave confession statements, which were recorded in the presence of P.W.11, who is the Village Administrative Officer. Pursuant to the confession statements, they produced not only weapons of crime viz. knife, aruval, but also cash taken from the shop of P.W.1. Apart from that, the accused also produced the cheque book, which contains the name of the shop of P.W.1. All these would go to show that the accused were in possession of these material objects viz. cheque book and account books, which belong to P.W.1. It is not the case of the accused that all these properties belong to them and they had no explanation to offer.

36. What are all contended before the Lower Court and equally here also is that P.W.11 is the stock witness of the respondent-police, since he has given evidence in 100 cases. The contention of the learned counsel for the appellants has got to be rejected, since P.W.11, is the Village Administrative Officer, whose help is to be obtained then and there whenever required by the police. Merely because of the reason that he has given evidence in 100 cases, it cannot be stated that he was the stock witness of the respondent and he was used for this purpose. His assistance was taken by the police in order to make sure that he gives proper evidence. All these recoveries have been made in the presence of P.W.11. Hence, it is a fit case, where this Court would draw presumption under Section 114 of the Evidence Act.

37. The occurrence had taken place on 8.6.2001and the accused were arrested on 17.6.2001 and 18.6.2001 respectively. All these M.os. recovered from the accused actually belong to P.W.1 except the weapons of crime. The accused had no explanation that they are receivers of the stolen property. In the instant case, the properties were recovered within a short span of time. The properties were also identified by P.W.1 and the properties had been recovered from the assailants in the presence of P.W.11 and the evidence of P.W.11 inspires confidence in the mind of the Court.

38. In the instant case, the act of murder has actually been taken place. Following the same, the amount has also been stolen and the complaint was given the next day morning. P.W.1 has categorically averred that cash of Rs.82,620/- was stolen from his shop. P.W.2 has seen the occurrence and he narrated the entire incident. Hence, it is clear that the recovery of money from the accused was not subsequently introduced in order to strengthen the prosecution. It was a true fact brought before this Court in Ex.P2. This part of confession statement made by the assailants/ accused 1 to 4 and the recovery of M.Os except the weapons of crime actually belong to P.W.1 would be the strong circumstance to point the guilt of the accused 1 to 4.

39. The contention put forth by the learned counsel for the appellants did not shake any merit at all, whether to be stated only for the purpose of rejection and thus it is well settled preposition of law that in a case hatched upon the conspiracy upon the assailants, the direct evidence if available, could have been put forth by the prosecution and in every case the direct evidence cannot be expected. In such circumstances, the conspiracy could be inferred from the proved circumstance. In the instant case unless there was a conspiracy among the four assailants, they would not have gone to the shop of P.W.1 during night hours and committed the murder of the deceased Chandrasekar

and also stolen the amount.

40. Now at this juncture, it is pertinent to point out that accused 1 was a person employed in the shop of P.W.1 not only at the relevant time but also on the relevant date. All these would go to show without any impediment the conspiracy which was hatched upon by the accused could be covered. Thus, before the Trial Court, the prosecution, by sufficient evidence, proved the conspiracy and pursuant to the conspiracy, accused 1 to 4 committed murder and also theft of amount and the Trial Court was correct in convicting the accused 1 to 4 under Sections 120B, 302 and 380 of the Indian Penal Code and awarded punishment as one found in the judgment.

41. Hence this Court is unable to notice anything to interfere either in the findings rendered in the judgment or sentence awarded by the Trial Court. Hence both the appeals are dismissed.

ssa.

To

1. The Judicial Magistrate No.I,
Erode.

2. The Judicial Magistrate No.I,
Erode, through
the Chief Judicial Magistrate,
Erode.

3. The Addl. Sessions Judge
(Fast Track Court I),
Erode.

4. The Addl. Sessions Judge
(Fast Track Court I),
Erode through
the Principal Sessions Judge,
Erode.

5. The Superintendent,
Central Prison,
Salem.

6. The Superintendent,
Central Prison,
Coimbatore.

7. The Sub Inspector of Police,
Erode North Police Station,
Erode District.

8. The District Collector,

Erode.

9. The Director General of Police,
Madras □ 4.

10. The Public Prosecutor,
High Court, Madras.

[am-8210]